

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Remington Lodging & Hospitality, LLC d/b/a Hyatt Regency-Wind Watch, a single employer with HHC TRS FP Portfolio, LLC, a subsidiary of Ashford Hospitality Trust, Inc. and Local 947, United Service Workers Union, International Union of Journeymen and Allied Trades. Cases 29–CA–093850 and 29–CA–095876

February 21, 2019

DECISION AND SUPPLEMENTAL ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN
AND KAPLAN

The General Counsel seeks partial summary judgment in this compliance proceeding on the basis that the Respondent's answers to certain allegations in the compliance specification are insufficient under the National Labor Relations Board's Rules and Regulations. For the reasons that follow, we grant the General Counsel's motion.

On February 12, 2016, the Board issued a Decision and Order, adopting, in relevant part, the administrative law judge's findings that the Respondent violated Section 8(a)(3) and (1) of the Act by subcontracting its housekeeping work to Hospitality Staffing Solutions (HSS) because of its employees' union activity, discharging an employee because it believed that she would engage in protected concerted activity, and refusing to hire incumbent HSS housekeeping employees upon termination of the subcontract.¹ Among other things, the Order required the Respondent to make whole all affected employees for any loss of earnings and other benefits resulting from these unfair labor practices. On January 27, 2017, the United States Court of Appeals for the Fifth Circuit entered a judgment enforcing the Board's Order.²

A controversy having arisen over the amount of backpay due under the Board's Order, the Regional Director for Region 29 issued a compliance specification and notice of hearing on June 1, 2018.³ The compliance specification informed the Respondent of its duty to answer, indicating that under Section 102.56 of the Board's Rules and Regulations, "a general denial is not sufficient" for allegations regarding any matters within the Respondent's knowledge, and that its "answer must state the basis for

any disagreement with any [such] allegations . . . and set forth in detail Respondent's position as to the applicable premises and furnish the appropriate supporting figures." The specification further warned the Respondent that failure to do so might lead the Board to "find those allegations in the compliance specification are true and preclude Respondent from introducing any evidence controverting those allegations." On June 29, the Respondent filed an answer to the compliance specification, generally denying the accuracy of the General Counsel's backpay calculations and asserting various affirmative defenses.

On August 2, the General Counsel moved for partial summary judgment, contending that the general denials in the Respondent's answer fail to satisfy the specificity requirements of the Board's Rules and Regulations. The General Counsel seeks summary judgment with respect to the allegations contained in section IV of the compliance specification concerning the method for calculating each discriminatee's gross backpay. On October 9, the Respondent filed a response in opposition to the General Counsel's Motion for Partial Summary Judgment. On October 11, the Board issued an Order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's motion should not be granted. On October 25, the Respondent filed a response to the Notice to Show Cause repeating and expanding upon arguments raised in its earlier opposition.

The Board has delegated its authority in this proceeding to a three-member panel.

On the entire record, the Board makes the following

Ruling on Motion for Partial Summary Judgment

Section 102.56(b) and (c) of the Board's Rules and Regulations⁴ states, in relevant part, as follows:

(b) *Contents of answer to specification.* The answer shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification at issue. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into

¹ *Remington Lodging & Hospitality, LLC*, 363 NLRB No. 112.

² *Remington Lodging & Hospitality, LLC v. NLRB*, 847 F.3d 180.

³ All of the following dates are in 2018.

⁴ Contrary to the Respondent's argument, the Board's Rules and Regulations, not the Federal Rules of Civil Procedure, govern pleading and summary judgment procedure before the Board. See, e.g., *Raser*

Tanning Co. v. NLRB, 276 F.2d 80, 82 (6th Cir. 1960), cert. denied 363 U.S. 830 (1960); *Excel DPM of Arkansas, Inc.*, 324 NLRB 880, 880 fn. 1 (1997); *Krieger-Ragsdale & Co.*, 159 NLRB 490, 495 (1966), enf'd. 379 F.2d 517 (7th Cir. 1967), cert. denied 389 U.S. 1041 (1968); *Armstrong Cork Co.*, 112 NLRB 1420, 1421 (1955).

the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures.

(c) *Effect of failure to answer or to plead specifically and in detail to backpay allegations of specification . . .* If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be found so by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting the allegation.

Section IV of the compliance specification addresses the method in which gross backpay is calculated and the amount of gross backpay owed.⁵ It sets forth the following calculation formula: "An appropriate measure of gross backpay due to the discriminatees during [the] backpay period is their average bi-weekly earnings computed on a calendar quarterly basis." Section IV bases the biweekly earnings of each discriminatee on their average regular and overtime hours worked per quarter and their hourly rate of regular and overtime pay. Regarding discriminatees for whom the Respondent did not provide payroll records, the specification bases their biweekly earnings on the average hours worked by comparable employees and the Respondent's lowest starting wage rate in its reinstatement offers to other discriminatees. The specification

compiles these figures for each calendar quarter in worksheets appended to the specification.

In its June 29 answer, the Respondent denies that the General Counsel's method of calculating backpay is appropriate, and it offers bare denials of the section IV allegations that it contests and, for those allegations, requests without elaboration that "the General Counsel meet [his] burden of proof."⁶ It does not state a basis for its disagreement or furnish alternative figures. Its October 25 response to the Notice to Show Cause offers no additional details or supporting figures. Because the relevant data is within the Respondent's knowledge and control, it has failed to comply with the requirements of Section 102.56(b), which expressly states that such general denials are insufficient.⁷ Thus, the allegations in section IV of the compliance specification are deemed admitted to be true under Section 102.56(c). We therefore grant the General Counsel's Motion for Partial Summary Judgment.⁸

ORDER

IT IS ORDERED that the General Counsel's Motion for Partial Summary Judgment is granted as to section IV of the compliance specification.

⁵ The Respondent maintains that the calculations in section IV are incomplete because they do not reflect reinstatement offers and may encompass persons not properly identified as discriminatees. However, the allegations related to those backpay components appear in sections II and III of the specification. Thus, they are not at issue in the pending motion for partial summary judgment, which encompasses only the allegations in section IV.

⁶ The Respondent admitted only one allegation – that a particular discriminatee worked a biweekly pay period – and neither admitted nor denied that the discriminatee worked at least 40 hours per week prior to her discharge.

⁷ See *United States Service Industries*, 325 NLRB 485, 486 (1998). The Respondent asserts that its general denials pertaining to those housekeeper-discriminatees employed only by HSS are permissible under Sec. 102.56(b) because it has no employment records for them, and their hours worked and rate of pay are therefore not within its knowledge. As alluded to above, the compliance specification computed gross backpay for these individuals using (1) the Respondent's employment records

showing the average quarterly hours worked by three comparable housekeeping employees whom the Respondent discharged when it subcontracted their work to HSS and subsequently rehired several months after it cancelled the subcontract, and (2) the Respondent's lowest starting wage rate for discriminatees offered reinstatement. It is well established that the General Counsel may use such comparator data to approximate the amount of backpay owed to discriminatees and that such data is within a respondent's knowledge. See, e.g., *Paolicelli*, 335 NLRB 881, 883–884 (2001); see also NLRB Casehandling Manual (Part Three) Compliance Sec. 10540.3 (2018). Critically, the Respondent has failed to explain why the three housekeeping employees are not valid comparators for the discriminatees employed only by HSS. See, e.g., *Shenandoah Coal Co.*, 312 NLRB 30, 30–31 (1993).

⁸ The Respondent's contention that it is entitled to cure procedural defects in its answers even after a grant of summary judgment is mistaken. As provided in Sec. 102.56(c), the Respondent is now "precluded from introducing any evidence controverting the allegation[s]." See also *Shenandoah Coal*, supra at 31.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 29 for the purpose of arranging a hearing before an administrative law judge on the remaining allegations contained in the compliance specification.

Dated, Washington, D.C. February 21, 2019

John F. Ring, Chairman

Lauren McFerran, Member

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD